No. 2699.

United States
Circuit Court of Appeals
For the Ninth Circuit

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation, Appellant,

vs.

CLARA MILLS, GEORGE F. STEELE, Insurance Commissioner of the State of Idaho, et al., Appellees.

Brief of Appellant

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

RICHARDS & HAGA and
McKEEN F. MORROW,
Solicitors for Appellant.
Residence: Boise, Idaho.

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BRIEF OF APPELLANT

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

STATEMENT OF THE CASE.

This is an appeal from an order denying, in part, a temporary injunction.

The suit was commenced by appellant May 6, 1915, primarily for the purpose of enjoining the appellees, Clara Mills and her associates, from collecting under a certain judgment obtained against appellant in the State Court, more than their pro rata part of the penalty of a certain fidelity bond under which a large number of claimants were making claims against appellant, the aggregate of such claims being over $90,000.00, whereas, the penalty of the bond was

only $50,000.00. Appellant also sought to restrain the Insurance Commissioner of the State of Idaho from taking any action to annul appellant's license or right to do business in the State of Idaho because of its refusal to pay Clara Mills and her associates the full amount of their said claims, to-wit: $22,-624.33, with interest.

Appellant further sought a determination of the amount due the respective claimants, and the pro rata part of the penalty of the bond which each claimant was entitled to receive, to the end that appellant might with safety pay the claims so made against it without rendering itself liable to other claimants for having paid any claimant more than the pro rata part of his just claim.

Appellant also sought to compel appellees to account for certain dividends received and which should have been credited upon their said claims and judgment, the amount of which dividend was unknown to appellant.

The Court granted a temporary injunction against the Insurance Commissioner, but left Clara Mills and her associates free to collect a certain proportionate part of their claims. Without, however, having in any way determined the amount due the several claimants, or the aggregate of the valid claims under said bond, or the amount due Clara Mills and her associates, and without requiring them to account for dividends received and for which no credit had been allowed appellant.

Under the order made by the Court appellant was compelled to pay forthwith to Clara Mills and her associates, $13,614.00, or suffer its securities, deposited with the State of Idaho, to be sold in satisfaction of said claims. Such order was made without first determining the validity of the claims so ordered paid, and without first determining the just proportion of the penalty of the bond to which said claimants would be entitled, and it places appellant in the position that it may later be required to pay to other claimants the full penalty of the bond in addition to the sum aforesaid.

The matter was heard below on the verified Bill of Complaint in this cause (Tr., pp. 7-33), and the verified Bill of Complaint in the cause pending in said Court, wherein William Leonard was plaintiff, and this appellant and the said appellees, except George H. Steele, were defendants, being Equity Cause No. 530 (Tr., pp. 636-652), and on the motion to dismiss filed by Clara Mills and her associates. The facts are, therefore, not in dispute. The admitted facts as set forth in the two verified Bills of Complaint above referred to, briefly stated, are in substance as follows:

On the 6th day of March, 1909, one William G. Cruse was appointed Bank Commissioner of the State of Idaho. And on the 15th day of March, 1909, said Cruse as principal, and the appellant, American Surety Company of New York, as surety, executed to the State of Idaho a certain bond in the penal sum of $50,000.00, to the effect that said Cruse would

"well, faithfully and impartially discharge the duties of his office, and pay over to the person entitled by law to receive it, all money coming into his hands by virtue of his office, etc." (Tr., p. 33.) Thereafter, and on or about the 31st day of August, 1910, the Idaho State Bank at Hailey, Idaho, closed its doors and suspended payment. And thereafter, and on the 31st day of August, 1912, Clara Mills and her associates, the names of whom are set forth in paragraph IX of appellant's Bill (Tr., p. 12), commenced an action in the State Court of Blaine County, Idaho, against appellant for approximately $22,000.00, such action being based on the alleged claim that plaintiffs were entitled to recover from the surety on the Bank Commissioner's bond the amount of money which they had on deposit in the said bank at the time it closed its doors and suspended payment. Process in said action was served upon this appellant, defendant there, and its time for appearance expired on October 14, 1912. But on October 7, 1912, appellant served upon counsel for plaintiffs in said suit, a written notice and petition and bond for removal of said cause from the State Court to the Federal Court, and said notice, petition and bond were filed with the Clerk of the Court in which said action was pending, on the 8th day of October, 1912, and in less than thirty days thereafter, to-wit, on October 28th, 1912, appellant filed with the Clerk of the United States District Court for said district a duly certified copy of the record in said action, all in full compliance with the provisions of Section 29 of the Judicial Code.

That pending the removal of the cause to the Federal Court, and on, to-wit, the 16th day of October, 1912, the attorneys for Clara Mills and her associates, plaintiffs in said action, prevailed upon the Clerk of the State Court in which such action had been commenced, to enter appellant's default, all without notice to or knowledge of such action by either appellant or the Court. And thereafter, to-wit, on May 19th, 1913, the said State Court entered a default judgment against appellant for $22,624.33; said State Court, upon the objection of the attorneys for plaintiffs therein, having declined upon terms, or otherwise, to permit appellant to plead or otherwise appear and defend in said action. And the said Clara Mills and associates now seek to enforce said judgment with interest at 7% from the date the same was entered, as aforesaid. That thereafter, and on August 30th, 1913, L. A. Dithmer, William Leonard and others commenced a similar action against appellant in the same Court. The action of Leonard was transferred to the Federal Court and is now pending in said Court. Leonard, in his action, demands judgment against appellant for $9656.93, with interest at 7% from September 1st, 1910. The said Dithmer and his associates, their names and the amount claimed by each being set out on page 16 of the transcript, have an action pending against appellant in said State Court, wherein they pray judgment against appellant for about $56,000.00. The aggregate of the claims of Leonard and Dithmer and their associates, not including Clara Mills and those join-

ing with her in the first action, being approximately $69,000.00, including interest, at the time of the commencement of this suit, and the aggregate of all claims, including the judgment of Clara Mills and her associates, being over $90,000.00, or over $40,000.00 in excess of the penalty of the bond. That notwithstanding all of said claimants are demanding judgment against appellant for the full amount they had on deposit in the bank at the time it closed its doors, and the Mills claimants have actually recovered judgment for such amount, they have, nevertheless, drawn large sums as dividends from the Receiver of said bank, which they have not credited upon their claims, but are seeking to recover from the surety the amount of their respective deposits as well as dividends thereon from the Receiver of the bank. That Leonard, Dithmer and their associates claim not to be bound by the default judgment acquired by Clara Mills and her associates against appellant, and deny the right of appellant to pay said judgment or any part thereof, and claim that in view of the fact that the claims of Dithmer, Leonard and their associates exceed the amount of the penalty of the bond, any payment made by appellant to Clara Mills and her associates operates as a direct loss to said Leonard, Dithmer and their associates, and that they will decline to recognize any such payments, and decline to be bound by the judgment obtained by said Clara Mills and her associates, for the reason that they were not parties thereto, and have not had an opportunity to contest the claims of said judgment creditors.

For these and other reasons set forth in appellant's Bill, appellant brought its suit in equity to compel all claimants to come into Court and establish their respective claims in one suit, not only as against appellant, but as against each other, to the end that appellant might be protected against having to pay more than the penalty of its bond, and each claimant receive his just proportion of the fund, in the event the aggregate of valid claims exceeded such penalty. Appellant alleged in its Bill that Clara Mills and her associates should be perpetually enjoined and restrained from enforcing the judgment obtained in the State Court, for the reason that the same was wrongfully obtained through accident and mistake, and that the enforcement thereof would be unjust, inequitable and unconscionable, and that it was void for the reason that under Section 29 of the Judicial Code the jurisdiction of the State Court terminated upon the filing of a proper petition and bond for removal, with a written notice thereof duly served upon the plaintiffs in said action, as provided by said Section 29; and that appellant was not required to plead in said action, except as provided in said Section 29, until the cause was remanded from the Federal Court.

The Court below held that appellant was entitled to protection to the end that it might not be compelled to pay more than the penalty of the bond, and held that the judgment obtained by Clara Mills and her associates was not binding upon other claimants who were not parties to that action, and that no claimant

was entitled to more than his pro rata part of the penalty of the bond, based upon the aggregate of valid claims against appellant under the bond, and that each claimant had the right to contest the claims of the others, the Court saying:

> "The other claimants would have the right to be heard on all matters touching the distribution of funds in which they have an interest, and if, upon a full hearing, in a proceeding to which all claimants are parties, it turns out to be necessary, in order to avoid injustice, to restrict the apparent judgment rights of Mills and her associates, that is a consequence for which they themselves are to blame, in that they did not bring into the suit in which they obtained their judgment, all parties in interest. Now for the first time the Court is asked to assume jurisdiction of the entire fund and make complete distribution thereof, and now for the first time all claims upon this fund are brought into a single proceeding for adjudication. Not only has the State Court never had jurisdiction of the fund, but it has never had jurisdiction of or adjudicated any issue as between the several claimants."

While the Court correctly applied the principle which governs controversies of this character, it entered an order in direct conflict with its decision; an order under which appellant may be required to pay a sum largely in excess of the penalty of the bond, for it permitted Clara Mills and her associates

to collect from appellant such proportion of the penalty of the bond as the face of the *undetermined claims* of Clara Mills and her associates bears to the aggregate of all claims, and without deducting or taking into consideration the dividends that have been paid, or that may be collected during the litigation, or thereafter. (Tr., pp. 72-75.)

The District Court also imposed most unusual and extraordinary burdens and penalties upon appellant in connection with the granting of the supersedeas pending this appeal. It not only required appellant to give a supersedeas bond in the sum of $15,000.00, with the usual conditions, but it added the extraordinary condition that, if appellant should fail to sustain its appeal, it should pay appellees an attorney's fee of $50.00, and interest on the said sum of $13,614.00, at the rate of *12% per annum* from December 9th, 1915, even though the order appealed from be substantially modified on appeal, whereas, the legal rate in Idaho is 7%. (See order allowing appeal, Tr. pp. 85-89, and Supersedeas Bond, Tr. pp. 95-98.)

ASSIGNMENT OF ERRORS.

The errors are specified in detail in the Assignment of Errors, pp. 78 to 82 of the record. Stated generally, they are:

1. That the Court erred in not enjoining and restraining until final hearing in this cause the appellees, Clara Mills and her associates, named in par-

agraph IX of the Bill (Tr., pp. 12 to 14), from collecting or enforcing the collection, or taking any steps whatsoever for collecting the penalty, or any part thereof, of that certain bond described in the Bill of Complaint herein.

2. That the Court erred in holding and deciding that the appellees, Clara Mills and her associates, named in paragraph IX of the Bill of Complaint (Tr., pp. 12 to 14), were entitled to collect $13,614 from the appellant under the penalty of the bond described in the Bill of Complaint, without first having determined the validity or correctness of the claims of said appellees, either as against appellant or other claimants under said bond, or without first determining the amount of the claims entitled to be paid out of the penalty of said bond and the proportion of such penalty to which each claimant may be entitled.

3. That the Court erred in holding and deciding that the said appellees could collect from appellant their proportionate share, based upon the face of their alleged claims, of the penalty of said bond, without accounting for the dividends collected and received by them on account of said claims, and which had not been credited thereon, and without making any provision for the crediting of future dividends.

4. That the Court erred in refusing to enjoin or restrain the said appellees from enforcing the judgment obtained by them against appellant in the District Court of the Fourth Judicial District of the

State of Idaho, in and for the County of Blaine, on May 19, 1913, and referred to in the Bill herein, under the allegations of the Bill that such judgment was taken by default after plaintiff had appeared by serving upon counsel for appellees written notice of the petition and bond for removal, and filed such notice, petition and bond for removal within the time and in the manner required by Sec. 29 of the Judicial Code, and pending the determination of the right of removal by the Federal Court.

5. That the Court erred in not holding that the default taken by the said appellees in the State Court was premature, and in not holding that the judgment entered thereon was void, and that the State Court had no jurisdiction pending the determination by the Federal Court of the right of removal.

6. That the Court erred in declining and refusing for any reason to enjoin or restrain the said appellees until final hearing from enforcing the collection of the judgment obtained by said appellees against appellant in the District Court of the Fourth Judicial District of the State of Idaho, in and for Blaine County, on May 19, 1913.

7. That the Court imposed unreasonable and illegal burdens and penalties upon appellant as a condition for a supersedeas and stay of proceedings pending the determination of this appeal.

For a more particular statement of the errors assigned and relied upon on appeal, reference is made to the assignment of errors contained in the record. (Tr., pp. 78-82.)

POINTS AND AUTHORITIES.

Where the penalty of a bond is less than the aggregate of the claims made against the surety thereunder, the equitable rule of pro rata distribution should be applied.

Illinois Surety Co. v. U. S. (C. C. A., 7th Circuit), 226 Fed. 665.

American Surety Co. v. Lawrenceville Cement Co., 96 Fed. 25.

United States v. American Surety Co., 126 Fed. 811.

United States v. American Surety Co., 67 C. C. A., 552, 135 Fed. 78.

United States v. Heaton, 63 C. C. A. 156, 128 Fed. 414.

Guffanti v. National Surety Co., 133 App. Div. 610, 118 N. Y. Supp. 207.

Same case on appeal, 196 N. Y. 452, 90 N. E. 174, 134 Am. St. Rep. 848.

Lordi v. People's Surety Co., 126 N. Y. Supp. 180.

Illinois Surety Co. v. Mattone, 138 App. Div. 173, 122 N. Y. Supp. 928.

A Court of Equity alone can afford a proper and just remedy for the protection of the claimants and the surety, where the aggregate of the several claims exceeds the penalty of the bond, and in such cases each claimant is interested in all claims presented for allowance and is entitled to be heard thereon.

Guffanti v. National Surety Co., 196 N. Y. 452, 90 N. E. 174, 134 Am. St. Rep. 848.

Illinois Surety Co. v. U. S. (C. C. A.), 226 Fed. 665.

American Surety Co. v. Lawrenceville Cement Co., 96 Fed. 25.

Guffanti v. National Surety Co., 118 N. Y. Supp. 207, and cases cited, *supra.*

Where the penalty of the bond is less than the aggregate of the claims arising thereunder, the surety is liable to each claimant for his pro rata part of such penalty, and if it pays any claimant more than his just share, it does so at its peril, and it is liable to other claimants for any such excess payment, although the aggregate it may thus be required to pay exceeds the penalty of the bond. The fact that the excess was paid in satisfaction of a judgment obtained against it in an action at law is not a good defense as against other claimants who were not parties to the action in which such judgment was obtained.

Commonwealth ex rel. Carson v. City Trust Safe Deposit and Surety Co., 224 Pa. 223, 73 Atl. 425.

Cappadonna v. National Surety Co., 125 N. Y. Supp. 162.

American Surety Co. v. Lawrenceville Cement Co., 110 Fed. 721, 723-724.

Laughlin v. American Surety Co., 51 C. C. A. 247, 114 Fed. 627.

In such cases, the proper procedure is a suit in equity for an accounting, to which the surety and all claimants are parties.

Illinois Surety Co. v. U. S., 226 Fed. 665.

Illinois Surety Co. v. Mattone, 122 N. Y. Supp. 928, 138 App. Div. 173.

Lordi v. People's Surety Co., 126 N. Y. Supp. 180.

Where several plaintiffs unite in an action against a surety for a judgment in their favor on a cause of action arising under one bond, they have a common and undivided interest in the moneys realized on such judgment, and it is sufficient for jurisdictional purposes that the amounts claimed and for which one judgment is sought against the surety collectively equal the jurisdictional amount.

Troy Bank v. Whitehead, 222 U. S. 39, 56 L. ed. 81.

Ill. Cent. Ry. Co. v. Adams, 180 U. S. 28, 45 L. ed. 410.

Marshall v. Holmes, 141 U. S. 589, 35 L. ed. 870.

Davis v. Schwartz, 155 U. S. 629, 39 L. ed. 289, 296.

Cowell v. City, etc., Co., 121 Fed. 53, 57.

Gibson v. Schufeldt, 122 U. S. 27, 30 L. ed. 1083.

Shields v. Thomas, 58 U. S. 3, 15 L. ed. 93.

Sinclair v. Cooper, 103 U. S. 105, 26 L. ed. 322.

Davies v. Corbin, 112 U. S. 36, 28 L. ed. 627.

Ex parte Nebraska, 209 U. S. 436, 52 L. ed. 876.

New Orleans, etc., Co. v. Parker, 143 U. S. 42, 36 L. ed. 71.

Under Sec. 29 of the Judicial Code, the jurisdiction of the State Court terminates upon the filing of a petition for removal and the bond and notice required to be filed under said section for the removal of causes, and all proceedings taken in the State Court after such filing and while the removal proceedings are pending and until the cause has been remanded to the State Court, are unauthorized and void, and the time within which the defendant must plead while such removal proceedings are pending is governed by Federal law.

Sec. 29, The Judicial Code.

Vol. 46, Congressional Record, p. 320, et seq.

Gordon v. Longest, 16 Pet. 97, 10 L. ed. 900.

Kanouse v. Martin, 15 How. 198, 14 L. ed. 660.

Home Life Ins. Co. v. Dunn, 19 Wall. 214, 22 L. ed. 68.

Mattoon v. Hinkley, 33 L. ed. 208.

The attempt of State Courts to exercise jurisdiction over causes after the Federal Court has assumed jurisdiction, or while the Federal Court has the question of its jurisdiction under consideration, has led to unseemly conflicts of jurisdiction.

Ches. & Ohio Ry. Co. v. McCabe, 213 U. S. 207, 208; 53 L. ed. 766.

Coeur d'Alene Ry. & N. Co. v. Spalding, 6 Ida. 97.

Dillon, Removal of Causes (5th ed.), p. 158.

Buxton v. Pennsylvania Lumb. Co., 221 Fed. 718.

Kern v. Huidekoper, 103 U. S. 485, 26 L. ed. 354.

Congress in the new Judicial Code intended to provide an orderly procedure for the removal of causes and for the determination of the question of jurisdiction so as to avoid in the future the unseemly conflict that frequently arose under the old law where a State Court arbitrarily and in total disregard of the rule of comity between Courts, proceeded with the trial of the case before the question of jurisdiction had been determined by the Federal Court.

The Federal Court may restrain the collection of a judgment obtained in an action at law in a State Court, when such judgment was wrongfully obtained or the defendant was prevented from interposing a meritorious defense and when the collection thereof would for any reason be inequitable, unconscionable or unjust.

National Surety Co. v. State Bank, 120 Fed. 593.

Phillips v. Negley, 117 U. S. 665, 29 L. ed. 1013.

Marshall v. Holmes, 144 U. S. 589, 35 L. ed. 870.

Union Railroad Co. v. Illinois Cent. R. R. Co., 207 Fed. 745.

Embry v. Palmer, 107 U. S. 3, 27 L. ed. 346.

Where, on an appeal from an interlocutory order denying a preliminary injunction against the collection of a money judgment, the appeal would be ineffectual unless a supersedeas is granted so as to preserve the situation in *statu quo* until the case can be heard on the merits or the appeal disposed of, it is error for the District Court to require, in addition to a sufficient bond to protect the appellees, that appellant shall pay, if the order be sustained in its entirety, fifty dollars attorneys' fees to the solicitors for appellees, and interest on the judgment, the collection of which is enjoined, at the rate of 12 per cent. per annum, when under the laws of the State such judgment only bears interest at the rate of 7 per cent. per annum, and further providing that if the order be modified on appeal so as to permit appellees to collect a part of such judgment, appellees shall still be entitled to interest at the rate of 12 per cent. on the amount they may on appeal be held entitled to collect.

ARGUMENT.

WHERE THE PENALTY OF A BOND IS LESS THAN THE AGGREGATE OF THE CLAIMS MADE AGAINST A SURETY THEREUNDER, EACH CLAIMANT IS ENTITLED TO HIS PRO RATA PART THEREOF, BASED UPON THE AGGREGATE OF THE VALID CLAIMS TO BE DETERMINED IN A SUIT IN EQUITY TO WHICH ALL CLAIMANTS ARE PARTIES, AND A SURETY THAT PAYS ANY CLAIMANT MORE THAN HIS PRO RATA PART DOES SO AT ITS PERIL.

The learned District Judge holds that the proper procedure in a case of this kind is a suit in equity, like the case at bar, for an accounting, to which the surety and all claimants are parties. He likewise correctly holds that in cases where the penalty of the bond is less than the aggregate of the claims arising thereunder, each claimant is entitled only to his pro rata part of such penalty, and that the interest of each claimant is in effect adverse to that of every other claimant, and that all claims are therefore entitled to contest the allowance and payment of the claims presented. But, after having correctly stated the principles of law and equity applicable in cases of this character, the Court entered an order in direct conflict with the views thus expressed.

We have here the anomalous situation that the Court has in effect ordered the payment of claims, pending before the Court, before their validity has been determined. It exposes the surety to the peril of having to pay a claim first and submit to a deter-

mination of its validity afterwards in a contest between other parties. Surely, there must be some relief to a surety that is placed in that position.

The Court permits Clara Mills and her associates who hold a judgment acquired in the State Court, in an action to which none of the other claimants were parties, to collect forthwith their full share of the penalty of the bond on the assumption that the claims embraced in the judgment are valid and binding upon other claimants. Yet it holds, and we think correctly so, that the other claimants are uneffected by such judgment and that they have the right to contest the claims of Clara Mills and her associates to the same extent as if no judgment had been obtained. It is entirely probable, therefore, that the claims of the judgment creditors may be greatly reduced or that some or all of them may be thrown out entirely when the matter comes on for hearing in the accounting case to which all claimants are parties. Notwithstanding the share of the penalty of the bond to which the judgment creditors may be entitled, remains open and undetermined, the Court declined to temporarily enjoin such judgment creditors, upon any condition, from enforcing collection thereof against the surety, but leaves the judgment creditors free to collect an amount to which they could only be entitled if all their claims be hereafter found valid.

It is settled law that if a surety pays any claimant more than his just and fair proportion of the penalty of the bond, determined upon a hearing to which all claimants are parties, it does so at its peril; and in

this case it may well happen that other claimants can establish the invalidity of the claims of Clara Mills and her associates, or show that for some reason or other such claimants have lost the right to share equally or pro rata with other claimants in the penalty of the bond, and the liability of the surety to the Mills claimants cannot therefore be determined until the final decree is entered in the accounting case.

We have, therefore, the unusual situation that the hearing on the validity of the claims is to be held after the claims have been paid. At such hearing the claimants who have been paid will have little or no interest in the suit, and the burden of establishing the validity of such claims must fall upon the surety. Should it fail in this, it will be forced to pay more than the penalty of the bond. It would seem that even a foreign surety company for hire is entitled to protection when a condition of this kind arises.

The surety has been duly warned by other claimants to make no payment whatever to the Mills claimants until the amount to which they are entitled has been determined in a hearing to which all claimants are parties. See Bill of Complaint of William Leonard (Tr. pp. 36-52).

The District Court, referring to the fact that the Mills judgment was obtained in an action to which the other claimants were not parties, and the effect of such judgment, said:

> "As already suggested, they might have instituted a suit in equity, by which the State Court could have laid hands upon the entire fund and

distributed it to all who were entitled to share therein, as their interests might appear, but instead of pursuing that course they brought an action at law, excluding therefrom others who were apparently equally entitled with them to share in the fund. *While the judgment so obtained might, in the absence of claims on the part of persons who were not parties to the suit, be conclusive upon the plaintiff, surely it cannot be held to conclude the rights of creditors who were not made parties to the suit.* Even if the view be taken that the judgment is conclusive of the question of the several amounts in which the judgment claimants were damaged by reason of the violation of the Bank Commissioner of the conditions of the bond, *a point I do not decide*, still the other claimants would have the right to be heard upon all matters touching the distribution of the fund in which they have an interest. And if, upon a full hearing, in a proceeding to which all claimants are parties, it turns out to be necessary, in order to avoid injustice, to limit the apparent judgment rights of Mills and her associates, that is a consequence for which they themselves are to blame, in that they did not bring into the suit in which they obtained their judgment all parties in interest." (Our italics.)

These observations, as stated before, cannot be reconciled with the action of the Court in denying appellant a temporary injunction, until the validity of all claims can be determined, enjoining the Mills

claimants from enforcing the collection of the judgment or harassing the surety with writs of execution while the suit is pending for the determination of the amount due not only the Mills claimants but all other claimants under the bond. The fact that some of the claimants have obtained judgments against the surety in actions at law to which other claimants were not parties, does not relieve such judgment claimants of the necessity of establishing the validity of their claims as against the other claimants before they can rightfully enforce the collection of any part of their judgment.

In this case, the Federal Court has now taken jurisdiction of all parties for the purpose of determining the amount to which each may be entitled and distributing the penalty of the bond accordingly. While such proceedings are pending, it seems extraordinary that some of the claimants should be permitted by process from another Court to enforce the payment of their claims and to harass and annoy the surety with such process.

Upon principle and authority it would seem that appellant has the right to have all other proceedings against it under the bond stayed until there has been an adjudication of the claims and a distribution of the fund by the Court that has taken jurisdiction of the entire controversy and of all parties to it. In considering decided cases upon matters of this kind, we must necessarily compare the statutes under which they were decided, with those here involved.

Sec. 191 of the Idaho Revised Codes is as follows:

"The Bank Commissioner shall, before entering upon the duties of his office, take and subscribe an oath to faithfully discharge the duties of such office, and shall execute to the State of Idaho a bond in the sum of fifty thousand dollars, in some surety company authorized to do business in this State, conditioned that he will faithfully and impartially discharge the duties of his office, and pay over to the persons entitled by law to receive it all money coming into his hands by virtue of his office, and conditioned further for the payment of any and all damages and costs that may be adjudged against him under the provisions of this chapter and chapter 13, title 4, of the Civil Code, the cost of which bond shall be a charge against the State, to be audited and allowed as other claims, and which bond shall be approved by the Attorney General."

A reference to the bond involved in the present case, which is attached to appellant's Bill (Tr. pp. 33 and 34), shows that it was executed precisely in accordance with this provision. A right of action on such bond is given by Sec. 295 of the Idaho Revised Codes in the following language:

"Every official bond executed by any officer pursuant to law is in force and obligatory upon the principal and sureties therein to and for the State of Idaho, and to and for the use and benefit of all persons who may be injured or aggrieved by the wrongful act or default of such officer in

his official capacity, and any person so injured or aggrieved may bring suit on such bond, in his own name, without an assignment thereof."

Very similar provisions are found in the United States bankruptcy act of 1898. Sec. 50 of that act provides for bonds of referees and trustees conditioned for the faithful performance of their official duties while Sec. 61 of the act provides for bonds by designated depositories.

Section 50h is as follows:

"Bonds of referees, trustees, and designated depositories shall be filed of record in the office of the Clerk of the Court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions."

The recent case of Illinois Surety Co. v. U. S., . . C. C. A. . . (7th Circuit), 226 Fed. 665, passed upon the effect of this statute. The action was brought by the United States for the use of certain trustees and receivers in bankruptcy proceedings and "any and all other receivers or trustees of estates in bankruptcy, pending in the northern district of Illinois, on a bond given by the La Salle St. Trust and Savings Bank, as principal, and the Illinois Surety Co., as surety, in the penal sum of $50,000 on the designation of a bank has a depositary of moneys of bankrupt estates under the statute. The bond was conditioned that the bank should faithfully and honestly keep and fully account for and pay over according

to law all deposits and funds which it should receive as such depository. On demurrer, the defendant raised the point that equity alone had jurisdiction, while the action was pending on the law side of the Court. The objection so raised was overruled by the trial Court but was sustained by the Circuit Court of Appeals, the Court saying:

> "A Court of Equity alone can afford a proper and just remedy, not merely adequate for the complainants (a defendant cannot object to an action at law because of mere inadequacy in this respect), but essential for the defendant's protection."

The Court said further:

> "The object of the bond is to afford protection to all beneficiaries alike. The spirit of the whole bankruptcy act would be violated, if the vigilant depositor could, by suit in his own interest, exhaust the obligation. Each depositor is entitled only to his proportionate share. If, however, each depositor could bring an action at law for his own use to obtain his proportionate share, the possible diversity of opinion as to what that share is might result either in subjecting the defendant to judgments in excess of the penalty or in defeating the just claims of the later litigants. Only in a proceeding in which all interested parties will have an opportunity to be heard, and resulting in a judgment or decree that will be *res adjudicata* as to the surety as well as to all depositors, can justice be done. * * * * "

This case seems to establish clearly the interdependence of the claims of the various appellees here, and as the wording of the statutes and the bonds given are practically identical, seems a clear authority on the right to pro rate.

A similar statute which has been before the Court in numerous cases is the act of August 13, 1894, 28 Stat. L. 278, which requires contractors engaged in public work for the United States to execute the usual penal bond with the additional obligation that such contractor shall promptly make payments to all persons supplying him with labor and material, and provides further:

> "Said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties and to prosecute the same to final judgment and execution."

An interesting series of cases arose upon this bond, growing out of the difficulties of one William Morgan, who contracted to build a battery in the harbor at Portland, Maine, and afterwards defaulted, having become heavily indebted to numerous sub-contractors and material men and also to the United States, the amount of such indebtedness being greatly in excess of the amount of his bond. Some seventy suits at law were brought in the United States Circuit Court for the Maine District, and other suits were brought in the Southern District of New York

and other Courts, and some forty claims had not been sued on at all when the surety filed a Bill in Equity in the Circuit Court for the Maine District, seeking an injunction and accounting. In overruling various demurrers to the Bill of the surety company, Circuit Judge Putnam held that the equitable principle of pro rating applied, and that judgments at law obtained on such bond between a single claimant and the surety could not be binding upon other claimants. (See American Surety Co. v. Lawrenceville Cement Co., 96 Fed. 25.) At page 26, the Court said:

> "As to both of these questions, we are so clear that the equitable rule of pro rata distribution exists, not only between the United States and individual claimants, but also as between individual claimants themselves, that we do not find it necessary to elaborate the proposition. The United States, by the force of the statute which we have cited, voluntarily make themselves trustee, alike for their own interest and for the interests of the individuals intended to be protected; and, having thus voluntarily created and accepted a trust, they are barred by equitable principles from asserting for themselves any advantage over other beneficiaries. So, also, it must be held that the rights of the individual beneficiaries, as among themselves, relate back to the execution of the bond, and arise, by relation, out of the same transaction (that is, the execution of the bond), and as of the same time (that is, the date of its execution). On equitable principles,

all individuals who may acquire rights under the bond stand in the same relation to each other as holders of several obligations secured by the same mortgage or deed of trust, specified therein, but issued at different dates. There is only one underlying equity, which necessarily, on equitable principles, protects all interested, whether it be the United States or individuals, share and share according to the proportions of their several claims."

At page 29, the Court also said:

"Marshaling assets, however, is a favorite equitable ground of jurisdiction. In this case, we have a quasi-fund—that is, the penal sum of $18,000, named in the bond executed by the complainant—to be distributed on an equitable basis among numerous claimants. It will be found, as we proceed, that this fund cannot be distributed expeditiously or justly without the aid of this Court sitting in equity. On any of the suits at law which this Bill is brought to restrain being brought to judgment, it would be impossible to determine in a manner which would do justice, either to the claimants or to the American Surety Company, the pro rata amount which should be awarded therein. *The question must arise, once for all, in each of the common law suits as to the actual amount of the claim in each of the others, and the determination must be final; and yet it could not be made in such way as to bind the other suitors.*" (The italics are ours.)

After this opinion had been rendered, the case was referred to a Master, all the creditors, with the exception of the United States, who had not been parties to the bill having intervened, and the Master reported upon the amount to which the various claimants were entitled. The United States declined to submit to the jurisdiction of the equity court and prosecuted its action to judgment. (See United States v. American Surety Co., 110 Fed. 913; 59 C. C. A. 256, 123 Fed. 287; 126 Fed. 811; 67 C. C. A. 552, 135 Fed. 78.)

The equity suit came before Judge Putnam again on confirmation of the Master's report, (110 Fed. 717), and he ordered an interlocutory decree enjoining further proceedings in the law actions and directing partial distribution. It appears from this decree that the individual actions at law were not prosecuted to judgment except in the case of the United States and one other action which apparently went to judgment before the reference to the Master. Certain claimants appealed from this interlocutory decree, and it was affirmed by the Circuit Court of Appeals, thus upholding the theory of pro rata liability and equitable jurisdiction to marshal the assets, according to the amounts of the claims as determined by the equity court. (Laughlin et al. v. American Surety Co., 51 C. C. A. 247, 114 Fed. 627).

The final opinion and decree of the Circuit Court followed the same theory and applied the principle of pro rating as against the United States in its action at law as well. (See U. S. v. American Surety

Co., and U. S. v. Lawrenceville Co., 126 Fed. 811-815.) This decree was affirmed also by the Circuit Court of Appeals in United States v. American Surety Co., 67 C. C. A. 552, 135 Fed. 78. In all of these cases and in the case of United States v. Heaton, 63 C. C. A. 156, 128 Fed. 414, in the 3d Circuit, the principle that the surety in such cases was only liable to the creditors to the amount of the penalty of its bond, and where their claims exceeded such penalty was only liable pro rata, was affirmed; and it was held to be necessary to have all such parties in a single action where their relative rights could be determined.

The act of February 24, 1905, 33 Stat. at L. 811, amended the act of 1894, so as to expressly provide for payment pro rata where the fund was insufficient, and a procedure in which all claimants could be brought in was also provided for, hence the later Federal cases on bonds of this nature frequently rested upon the statutory provisions.

Another group of cases which are clearly analogous to the case at bar have arisen under the New York laws, 1907, Chap. 185, p. 263, as amended by Laws 1908, chap. 479. This statute provided as follows:

> "All corporations, firms or persons * * * who carry on the business of receiving deposits of money for the purpose of transmitting the same to foreign countries shall * * * make, execute and deliver a bond to the people of the

state of New York in the sum of $15,000 conditioned for the re-payment of such deposits and the faithful holding and transmission of any money * * * delivered to them for transmission * * * "

Such statute also provides:

"A suit to recover on a bond required to be filed under the provisions of this act, may be brought by, or upon the relation of any party aggrieved in a court of competent jurisdiction."

The case of Guffanti v. National Surety Co., 133 App. Div. 610, 118 N. Y. Supp. 207, was an action in behalf of plaintiff and all others similarly interested to recover on a bond given under this statute by one Zanolini, who had absconded, and it appeared that the claims exceeded the amount of the bond. The court held that the action was properly brought in equity, and could not be brought in any other manner, and that all creditors were entitled to prorate. The court said:

"Second. The remaining question is whether the plaintiff can maintain the action in its present form. The undoubted purpose of the statute is to deter irresponsible parties from engaging in the business specified, and to provide a bond to indemnify creditors. By requiring a bond to be given a fund is provided for the payment of such creditors. Such fund, I think is not for one creditor but for all, and should be equitably distributed among all according to their respective

claims. It cannot be that the Legislature intended that the benefits to be derived from the bond were solely for the most diligent creditor if his claim happened to be in excess of the penalty of the bond; nor do I think it can be said, when the purpose of the statute is taken into consideration, that it was intended that each creditor, no matter what the amount of his claim might be, should be compelled to maintain an action at law, but, on the contrary, any one creditor might maintain an action on behalf of himself and all others simliarly situated. An action at law by one creditor solely on behalf of himself is entirely inconsistent with the purpose for which the bond was required or given. Under statutes making stockholders liable for the debts of a corporation it has been repeatedly held that one creditor could not maintain an action at law to enforce such liability and collect his claim, but he must sue in equity on behalf of all creditors. Mathez v. Neidig, 72 N. Y. 100; Griffith v. Mangam, 73 N. Y. 611; Pfohl v. Simpson, 74 N. Y. 137; Marshall v. Sherman, 148 N. Y. 9, 42 N. E. 419, 34 L. R. A.757, 51 Am. St. Rep. 654; Hirshfield v. Fitzgerald, 157 N. Y. 166, 51 N. E. 997, 46 L. R. A. 839; Knickerbocker Trust Co. v. Iselin, 185 N. Y. 54, 77 N. E. 877, 113 Am. St. Rep. 863; Terry v. Little, 101 U. S. 216, 25 L. Ed. 864. It has also been held that a creditor of a deceased husband cannot maintain an action at law to satisfy his individual claim from insurance moneys pur-

chased by excess of premium above $500, which the statute provides shall be primarily liable for the husband's debts. Kittel v. Domeyer, 70 App. Div. 134, 75 N. Y. Supp. 150, approved on this point, 175 N. Y. 205, 67 N. E. 433; Matter of Thompson, 184 N. Y. 36, 76 N. E. 870."

The Court then cites and quotes with approval from the Lawrenceville Cement Company case (C. C.) 96 Fed. 25; Pfohl v. Simpson, 74 N. Y. 100; Terry v. Little, 25 Law Ed. 864; Hirshfield v. Fitzgerald, 46 L. R. A. 839. * * * The Court then continues:

"In that case (Lawrenceville case), as in the one now before us, each creditor's claim was distinct and his cause of action accrued as soon as the default occurred. The statute provided that any creditor might bring an action, but notwithstanding that fact the court held that the bond should be enforced by an action in equity to secure the ratable distribution of the proceeds among all the claimants. Here the respondent is liable upon its bond to the extent of $15,000. There are, as already stated, numerous creditors, and the sum named is insufficient to pay them in full. They have equal rights that their claims be satisfied from the proceeds of the bond, and the statute under which it was given undoubtedly contemplated that they should share equally. This result can only be obtained by an action in equity on behalf of all the creditors.

"My conclusion, therefore, is that under the facts stated in the complaint a court of equity is justified in assuming jurisdiction of the action, and that the plaintiff is not only entitled to maintain the action on behalf of himself and all other creditors, but that he would be precluded from maintaining it in any other form."

This decision was affirmed by the Court of Appeals of New York, under the same title, 196 N. Y. 452, 90 N. E. 174, 134 Am. St. Rep. 848. The court there said:

"In this case it appears that the money of one hundred and fifty or more persons deposited with the defendant Zanolini has neither been faithfully held nor transmitted as provided by the terms of said bond. The total amount of the claims exceed the penalty of the bond and the claims of each of said persons against the defenant surety company arises out of the same instrument and are dependent upon the same contract. The penalty of the bond is the measure of the total liability of the defendant surety company and the depositors with Zanolini must lose the amount of such deposits unless they are collected from the bond. A just and equitable payment from the bond would be a distribution pro rata upon the amount of the several embezzlements. Unless in a case like this the amount of the bond is so distributed among the persons having claims which are secured thereby, it must

necessarily result in a scramble for precedence in payment, and the amount of the bond may be paid to the favored, or to those first obtaining knowledge of the embezzlements."

In the above case, the point was emphasized that the action must be in equity because all the claimants on such bond were interested in the amounts recovered or claimed by the others, because such claims would, if sustained for more that the claimants were justly entitled to, reduce their own claims to that extent.

Another case holding that single actions at law on such bond were not maintainable is Lordi v. People Surety Co., 126 N. Y. Supp. 180.

The case of Illinois Surety Co. v. Mattone, 138 App. Div. 173, 122 N. Y. Supp. 928, is exactly in point with the case at bar. It was an action to restrain prosecution of numerous suits against the complainant on such a bond, to determine its liability on the bond and to have the amount of such liability distributed equitably to the persons having valid claims under the bond. There were actions at law pending in various courts and some actions which had already gone to judgment, and there was in addition a suit by a creditor named Imperato, in behalf of himself and all others, pending in the same court for distribution in equity. The court awarded the injunction, holding that the depositors were only entitled to their pro rata part and that the denial of any liability whatever by the Surety Company was not

necessarily fatal, and requiring the company to pay into court the amount of the bond, to be held subject to disposition in accordance with the final decree. The injunction ran against all the actions, except the equity action by Imperato, and required all parties to come in to the equity actions and establish the validity of their claims regardless of whether or not they had judgments at law. The court's opinion is very instructive, hence we quote from it at length:

> "The question of the liability of the plaintiff upon its bond may be said to have been finally decided against it so far as concerns the courts of this state. Guffanti v. National Surety Company, 133 App. Div. 610, 118 N. Y. Supp. 207, affirmed 196 N. Y. 452, 90 N. E. 174; Musco v. United Surety Co. 132 App. Div. 300, 117 N. Y. Supp. 21, affirmed 196 N. Y. 459, 90 N. E. 171. The plaintiff, however, is liable in the aggregate only to the amount of its undertaking, and that amount constituted a fund for the payment of the creditors pro rata, and is to be distributed among them equitably according to their respective claims. Mere diligence in prosecuting a claim against such a fund will not entitle the prosecuting claimant to a priority of payment. The fund can therefore be reached only by an action in equity prosecuted in a court possessing equitable jurisdiction; for 'an action at law by one creditor solely on behalf of himself is entirely inconsistent with the purpose for which the bond was required or given.' Guffanti v. National

Surety Co., supra. The several defendants in this action who have begun actions at law in courts possessing no equitable jurisdiction can therefore apparently take nothing by their actions, and will suffer no real prejudice if such actions are stayed until an action, properly brought in equity, can be prosecuted to final judgment. It is true that the Musco case, above cited, was an action at law by an individual claimant to recover his own loss, and was not for the benefit of creditors generally, and it also appears by the complaint in this action that judgments have been obtained against plaintiff in courts having no equitable jurisdiction. It does not appear, however, that the point was taken in any of these actions that an action at law would not lie at the suit of a single creditor, and in the Musco case it does appear that no such question was discussed or considered. But even if plaintiff can successfully defend, upon this technical ground, the numerous actions brought against it at law, it is unreasonable that it should be compelled to incur the expense of doing so, when the claims of all parties can be equitably determined and adjusted in an action properly brought for that purpose.

"It is suggested that plaintiff can obtain all the relief necessary for its protection in the representative action in equity brought by the defendant Imperato in behalf of himself and all others similarly situated. It is true that the com-

plaint in that action asks for an injunction restraining actions at law for the recovery of individual claims, but it does not appear that the plaintiff in that action has applied for or obtained such an injunction, nor is it suggested how this plaintiff, as a defendant in that action, could procure an injunction against his co-defendants. He can obtain such relief in that action only by the grace of the plaintiff therein, and should not be called upon to rely solely upon so slight a dependence. It is well settled that a Court of Equity has jurisdiction to entertain an action of this nature. In cases where many persons have claims and are prosecuting or are about to prosecute them at law against one of the defendants or class of defendants or a fund liable in equal degree to all those persons and to others, the Court in Equity, to forestall a multiplicity of actions, has jurisdiction of an action for a general accounting and adjustment of all the rights, and to restrain separate and individual actions at law in the same or other Courts, thus bringing all the litigation into one suit." Pfohl v. Simpson, 74 N. Y. 137. There are numerous cases sustaining the rule above quoted. Board of Supervisors v. Deyoe, 77 N. Y. 219; Kellogg v. Siple, 11 App. Div. 458, 42 N. Y. Supp. 379, and authorities cited in Musco v. United Surety Co., *supra.* It has been suggested that many of these authorities are not applicable, because the plaintiff denies all liability upon the bond. This, however, is not

necessarily fatal. It has been held that such an action can be maintained to determine a large number of claims to a fund in Court, although the plaintiff insists that none of the claimants are entitled to any share in the fund (Kellogg v. Siple, *supra*). Such an action as this is not in the nature of an action of interpleader wherein several parties make conflicting claims to the same fund, but is entertained for the purpose of preventing a multiplicity of actions. There should, however, be complete assurance that the claimants, whose affirmative actions have been restrained, will, if successful, find a fund applicable to their payment, and which the Court can so apply in this action. The plaintiff is a foreign corporation, and though it is doubtless entirely solvent at the present time, and has made such provision as our statutes require for the protection of creditors in this State, no one can foresee what the state of affairs may be when this action goes to final judgment. If the plaintiff who seeks a favor at the hands of the Court should deposit in Court the sum represented by its bond to remain subject to final judgment in this action, an injunction *pendente lite* against all claimants who have brought or threaten to bring individual actions at law could properly be granted. There is no reason, however, in any case, for enjoining the prosecution of the representative action in equity already brought by the defendant, Imperato, for all the questions involved can be as satis-

factorily and equitably settled in that action as in this. The motion as it was presented at Special Term was properly denied, but the order appealed from will be so modified as to reserve to plaintiff the right to renew the motion upon compliance with the suggestions contained in this opinion, and, as so modified, will be affirmed, with $10 costs and disbursements to each respondent who appeared and filed a separate brief. All concur."

In another case arising under this statute, that of Cappadonna v. Illinois Surety Co., 125 N. Y. Supp. 162, the Court was clearly of the opinion that payment of judgments obtained at law on such a bond to the full amount of the penalty would not discharge the surety from liability, because all payments in excess of the pro rata share of the judgment creditor based on the total amount of valid claims were held to be voluntary payments.

The same rule was clearly announced in Commonwealth ex rel. Carson v. City, etc., Surety Co., 224 Pa. 223, 73 Atl. 425. Here several suits had been brought on a bond given to the United States for public work under the statute above quoted. The total amount of the bond was $6695. The surety had paid a judgment for $3625.70 and an uncontested claim for a small amount. Another claim for about $8,000 had been contested and when the matter came before the Pennsylvania Court, both the claimant and the surety company were in the hands of receivers. The claimant contended that it was entitled to its

pro rata share, while the surety urged that claimant was only entitled to the difference between the amount paid and the penalty. The Court sustained the claimant's contention, although this resulted in a payment in excess of the penalty of the bond. On this point the Court said:

> "The auditor, instead of limiting the recovery to the difference between the amount previously paid by the surety company and the penal sum, ascertained the per centum the creditors would be entitled to on an equal distribution between all, and as a result awarded to the bridge company the sum of $4536.58. The report of the auditor was approved by the Court below, and it meets with our approval as well. Whatever the surety company will have paid on this contract of suretyship in excess of its legal liability therein must be regarded as a voluntary payment by it. Its covenant, while with the government, was exclusively for the protection of the contractors under the Penn Erecting Company. When the surety company entered into the covenant, it did not know, and could not have known, the parties with whom the erecting company would contract, the amounts that would be due each, or the times of payment, but it must have understood its covenant to be for the protection of all alike; that is to say, that each was to share in the protection of the covenant on an equitable basis. Whether it did so or not it is the plain and manifest meaning of the bond. The sub-contractors, not a select-

ed few, but all embraced in the class, are the real use parties. It matters not that their names are not written in the bond. They could not have been, because the bond was a condition precedent to the awarding of the contract; but the use is as clearly defined as though their names appeared. Besides, to allow the suretey, either through favoritism or neglect, to work out a result which would give priority to some creditor or creditors over others, would be to defeat the very purpose the government has in view in requiring bonds for the protection of sub-contractors. *The surety company is without the slightest equity. It paid the judgments obtained against it with full knowledge of the fact that there was then an outstanding and unsatisfied claim of the bridge company, then in suit, for an amount which, together with the claims already liquidated, much exceeded the limit of its own liability. Yet, with knowledge of this fact, it proceeded to pay some of the creditors in full. It is no excuse to say that these payments were made to avoid execution. Threatened execution could and should have been met by appeal to the Court to put its restraining hand upon the creditor who would attempt to use its process, not for the collection of his own debt solely, but in part to defeat some one else in equal right with himself, in the fund to be subjected, and that too at the cost of the surety.*" (Our italics.)

A similar question arose upon distribution to said claimants in the Lawrenceville Cement Co. litigation,

supra, where it was held by both the appellate Court and the trial Court that claimants were only entitled to their pro rata share, and the fact that the surety had been reimbursed for payments made to certain creditors did not enlarge the equity of the other creditors. (See Am. Surety Co. v. Lawrenceville Cement Co., 110 Fed. 721, at pp. 723 and 724; Laughlin v. Am. Surety Co., 51 C. C. A. 247, 114 Fed. 627.) From these cases, it appears clearly that the liability of the surety in any case where the total amount of valid claims is in excess of the penalty of its bond, is not the amount of the claims of the various parties, but their pro rata share, and that the other claimants have an unquestionable right to contest the allowance of such a claim, or its payment, by the surety, unless they have been made parties to the suit in which the amount of such claim was determined; and inasmuch as the surety company pays any claim, either before or after suit or judgment, at its peril, and if it later develops that the amount paid was in excess of the pro rata share of the claimant, the surety is not entitled to credit for such excess, it seems clear that the enforcement of the Mills judgment in the present case should have been restrained in its entirety until the validity of such judgment against appellees, Leonard, Dithmer and others, had been determined.

In connection with the cases last cited, the allegations in the Bill (Tr. p. 20) that appellees, Clara Mills and others, named in paragraph IX, have collected large amounts as dividends, become important. If these parties can recover judgment and enforce

collection for their proportionate share of their deposits, based on the total amount of deposits, without accounting for dividends, they can, in theory at least, have a double recovery. So far as the record in this case shows, appellees may, under the order from which the appeal is taken, collect from the surety notwithstanding the full amount of their claims may be paid them by the receiver of the bank. There is no proof of damage or loss in this record and no protection whatever is afforded appellant as to the application of the dividends received from the bank.

The appellees, Clara Mills and her associates, sought to recover from the surety the full amount of their deposit in the bank at the time it closed its doors, without any showing or proof of the amount they might eventually recover from the bank. They chose to look to the surety for payment, on the theory that the surety could in turn step into the shoes of the appellees or be subrogated to their rights to collect the dividends from the bank; but it later developed that, while they were demanding payment from the surety of the full amount of their deposits, they were also drawing dividends from the bank without reducing their demands against the surety. The Court at the last moment, in providing for the supersedeas bond, provided that if this Court should hold that appellees could not hold or retain both the dividends received from the bank as well as the pro rata part of the penalty, then appellant should pay appellees their pro rata part less any dividends hereafter received "with interest at the rate of 12% from

December 9, 1915." The provision, however, regarding the deduction of dividends from the pro rata share is conditioned upon the order appealed from being modified in that respect by this Court.

We respectfully submit that the penalties imposed in connection with the supersedeas are not only unusual but we think are absolutely without precedent. In the State of Idaho, judgments bear interest at the rate of 7% per annum, and the highest rate authorized by contract is 12%. The Court, therefore, went to the very limit of the usury laws in penalizing appellant for taking an appeal. The appeal would have been ineffectual without the supersedeas. In order, therefore, to obtain an appeal from an order that clearly seems a proper subject for review, appellant had to submit to a penalty of 5% increase in the interest rate on the judgment, and an attorney's fee for $50, and the interest penalty is to be imposed, notwithstanding the order appealed from is modified to a very large degree by this Court. We submit that in justice to appellant, if the order appealed from is not set aside, this Court should protect appellant against the penalties imposed as a condition for a supersedeas.

COURTS OF EQUITY WILL ENJOIN THE ENFORCEMENT OF UNCONSCIONABLE OR INEQUITABLE JUDGMENTS OBTAINED AT LAW WHERE DEFENDANT HAS BEEN PREVENTED FROM INTERPOSING A MERITORIOUS DEFENSE.

The record in this case shows that while appellant was in good faith removing its cause from the State

Court to the Federal Court, the attorneys for appellees, without notice to the attorneys for appellant, prevailed upon the Clerk of the State Court to enter appellant's default, and that they later objected to such default being set aside and to appellant being permitted to plead to the complaint, notwithstanding it had a good and meritorious defense to the action and offered to submit to such terms as the Court might deem reasonable under the circumstances and to pay such damages as had been or would be sustained by the plaintiffs in said action, Clara Mills and her associates, because of the setting aside of such default, but all of such offers were refused by said appellees and their attorneys. We submit that a judgment obtained under such circumstances may be enjoined by a proper suit in equity, and the District Court should have granted the injunction prayed for on that account if there had been no other sufficient reason for the injunction.

Should the foregoing contentions of appellant be sustained by this Court, it will be unnecessary to take up the construction of Sec. 29 of The Judicial Code. The validity of the judgment which appellees seek to enforce rests upon the construction of that section. It is alleged in the bill that the action commenced by appellees in the State Court was removable to the Federal Court and that proper proceedings for the removal of that cause were instituted by appellant and that while such removal proceedings were pending appellant's default was entered in the State Court. If the cause was removable, as

admitted by the motion to dismiss, there can be no question that the State Court was clearly without jurisdiction to enter default or a judgment based thereon. We deem it unnecessary to cite authorities or extend the argument on that proposition. If, however, the cause was not removable but the proceedings were nevertheless in good faith instituted and the default of appellant was entered while such removal proceedings were pending, we still insist that, under the recent amendments to the removal statutes, the time within which a defendant who seeks to remove a cause must plead to the complaint or petition filed by plaintiffs in such cause is governed by Federal law until the cause has been remanded to the State Court, and that the jurisdiction of the State Court terminates upon the filing of the proper petition and bond with written notice served on counsel for plaintiffs, and this we shall now consider at some length.

COMPLIANCE WITH SECTION TWENTY-NINE OF THE JUDICIAL CODE TERMINATES THE JURISDICTION OF THE STATE COURT, WHICH IS NOT RESTORED UNLESS OR UNTIL THE CASE IS REMANDED.

The precise effect of the changes made by Section 29 of the Judicial Code in the procedure for removal upon the relative jurisdiction of the State and Federal Courts has never been judicially determined.

Section 3 of the Removal Act of March 3rd, 1875, as amended (4 Fed. Stat. Ann. 349), provided in part as follows:

"That whenever any party entitled to remove any suit mentioned in the next preceding section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from a State Court to the Circuit Court of the United States, he may make and file a petition in such suit in such State Court at the time, or any time before the defendant is required by the laws of the State or the rule of the State Court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the Circuit Court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such Circuit Court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said Circuit Court if said Court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the State Court to accept said petition and bond, and proceed no further in such suit; and the said copy being entered as aforesaid in said Circuit Court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said Circuit Court."

Section 12 of the Judiciary Act of 1789, 1 Stat. L. 79, was similar to the section just quoted, the chief difference being a provision as to the amount in controversy.

Section 29 of the Judicial Code of March 3rd, 1911, is as follows (italics show changes):

> "Whenever any party entitled to remove any suit mentioned in the last preceding section, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a State Court to the *District* Court of the United States, he may make and file a petition, *duly verified*, in such suit in such State Court at the time, or any time before the defendant is required by the laws of the State or the rule of the State Court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the *District* Court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such *District* Court, *within thirty days from the date of filing said petition*, a *certified* copy of the record in such suit, and for paying all costs that may be awarded by said *District* Court if said *District* Court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the State Court to accept

said petition and bond and proceed no further in such suit. *Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same.* The said copy being entered *within said thirty days* as aforesaid in said *District* Court of the United States, *the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause,* and the cause shall then proceed in the same manner as if it had been originally commenced in the said *District* Court."

The changes made in the wording of the section as shown above are quite radical, and in order to determine the effect to be given such changes we must, as held in Eddy v. Chicago & Northwestern Ry. Co., 226 Fed. 120, in construing sections 29 and 51 of the Code, consider both the history and intent of the legislation on the subject.

The first case in which the Federal Courts seem to have passed upon the question of a conflict of jurisdiction in a case sought to be removed was Gordon v. Longest, 16 Peters 97, 10 L. ed. 900, decided in 1842. The Court there held that the steps taken by the State Court after the filing of the removal petition and bond were *coram non judice* and void, saying at page 903:

"This is the first instance in which the State Court has refused to a party the right to remove his cause to the Circuit Court of the United States."

In Kanouse v. Martin, 15 How. 198, 14 L. ed. 660, decided in 1853, counsel for the defendant in error contended that the State Court retained jurisdiction to determine whether the jurisdictional amount was involved, but the Court held that the jurisdiction of the State Court ceased on filing the petition and bond and that plaintiff in error was not bound to plead in the State Court.

In Home Life Ins. Co. v. Dunn, 19 Wall. 214, 22 L. ed. 68, decided in 1873, the Court held that the State Court had no jurisdiction to determine whether or not a case was removable. The Court said at page 69:

> "The cause was out of the Common Pleas and in the Circuit Court. The former had jurisdiction to remit and the latter to receive it. Being in the latter, that Court had jurisdiction to retain it. If there were error on the part of the Circuit Court in overruling the motion to dismiss, because the case had been improperly brought there, the remedy should have been sought in the Federal Courts. The State Courts were incompetent to give it. The authority of the latter was at an end until the case should be restored, if that were ever done, by the action of the former. * * * *
>
> "The conditions prescribed having been complied with, the Act of Congress expressly required the State Court, where it was originally pending, 'to proceed no further in the suit.' The further proceedings of the Common Pleas was a clear

case of usurped jurisdiction. The illegality was gross. The action of the District and Supreme Court of the State gave them no validity."

Another early case in the State Court is that of Mattoon v. Hinkley, 33 Ill. 208, in which the facts were practically identical with those involved here. The State Court had entered a default after petition for removal had been filed, and the Supreme Court of Illinois held that this was erroneous and without jurisdiction and reversed the judgment entered therein.

In Phoenix Ins. Co. v. Pechner, 95 U. S. 183, 186; 24 L. ed. 427, decided Nov. 19, 1877, the Court held that in order to terminate the jurisdiction of the State Court, not only must the petition and bond be in proper form but the petition must state facts which, taken with those already appearing from the record, entitled the party to a removal to the Federal Court. This case has been followed in many cases, although such construction seems to nullify the express provision of the statute, that the State Court shall proceed no further in such suit and has resulted in what the Supreme Court of the United States, in Chesapeake and O. Ry. Co. v. McCabe, 213 U. S. 207, 53 L. ed. 765, has very properly called an "unseemly conflict of jurisdiction."

The only restraint upon this conflict is the State Court's conception of comity, and as shown by the McCabe case, *supra*, and numerous other decisions in both State and Federal reports the principle of

comity has been wholly insufficient to protect litigants in their rights. Other cases showing this conflict of jurisdiction are Morbeck v. Bradford-Kennedy Co., 19 Ida. 83, 113 Pac. 89; Buxton v. Penn Lumber Co., 221 Fed. 718, and State, for the use of Mills, et al., v. American Surety Co., 26 Ida. 652, 145 Pac. 1097, the last case being the decision of the Supreme Court upon the appeal from the judgment obtained against appellant by appellees, Clara Mills and others.

The result of the rule in Insurance Co. v. Pechner, *supra*, is highly anomalous. A defendant, entitled under the law to a removal, is often compelled by necessity to proceed in both the State and the Federal Courts at the same time. It is a matter of common knowledge supported by a multitude of reported cases that the question of Federal jurisdiction is frequently in doubt and at times exceedingly close. It is a question upon which Federal and State Courts differ repeatedly, and there is a twilight zone in which the line of demarkation between Federal and State jurisdiction is so faint that even learned judges do not see it alike; nevertheless, under this rule, if a defendant seeks a removal and the State Court does not voluntarily give up jurisdiction as a matter of comity, the defendant must proceed in both Courts at the same time. Only the Federal Court can decide the right of removal, so he must take the case there for such determination or await the tedious process of contesting the case through the trial and appellate Courts of the States to the United States Supreme Court.

If he takes his record to the Federal Court, and that Court retains jurisdiction, he can restrain further proceedings in the State Court and such proceedings will be held void, although it may be necessary for him to go to the Supreme Court of the United States in order to have them held void. (See Insurance Co. v. Dunn, *supra.*) If, however, the Federal Court remands the case, all the proceedings in the State Court are by the above rule held to be valid, although taken pending the determination of the right to remove. In short, under this rule, a party seeking to remove a cause, acts at his peril and must proceed in the State Court exactly as if he did not have a right to remove, and this we do not think was contemplated by the framers of the Judicial Act of 1789, or any of the amendments made thereto, when they inserted the provision that "it shall be the duty of the State Court to proceed no further in such suit."

It would seem that the settled practice down to 1877 had been that the State Court's jurisdiction absolutely ceased on the filing of the petition and bond for removal, and that that Court had no power or discretion whatever in the matter, as held in Gordon v. Longest, *supra*, and that the rule announced in the Peckner case was a departure from this practice which had been followed for eighty-eight years. What the underlying reasons for the rule in that case were the opinion itself does not indicate nor do any of the later cases following it, but it may have been adopted with reference to the delays possible under the removal statutes at that time. The party removing the

case was not required to file his record in the Federal Court till the first day of the next session, and this might be six or nine months distant and during all this time the other party could not move to remand the cause and have the question of removal determined. Furthermore, the party removing did not have to plead in the Federal Court until the record was filed on the first day of the term and this would frequently throw the case over that term of the Court. It is a well-known fact that during the last forty years there has been a great increase in the number of causes removed to the Federal Courts, and undoubtedly removal was sought in many cases without sufficient ground in order to delay trial of the cases, although this subjected the party to a liability on his bond. On this practice the rule in the Pechner case would have a salutary effect, because it allowed the State Court to determine whether there was any basis for removal, and if not, to proceed subject to its action being held void if the Federal Courts held the cause was removable. This rule, however, worked an undoubted hardship upon parties who sought removal in good faith because it placed them at the mercy of the State Court and compelled them to litigate their rights in two forums at the same time.

The State Courts, as shown by the reports, have been very jealous of attempts to escape from their jurisdiction to that of the Federal Court, and we think their general attitude is shown by the action of the Idaho Courts in upholding the default judgment obtained by appellees, Clara Mills and others,

against appellant and out of which the present action arose. This appears quite clearly in the opinion of the Supreme Court (26 Ida. 669-670), where it is said:

> "In such a case, another principle is involved; that is: What are the rights of the plaintiff where the defendant does appear and attempts to gain what it thinks is an advantage over the plaintiff and a benefit to defendant? In such cases, the defendant becomes an actor; it is aggressive in its own interests and seeks to use its time in an unlawful procedure for its own advantage. It is then that Courts considering the rights of both parties hold that the plaintiff cannot be charged with such acts of the defendant, and in dealing with substantial justice will require the defendant to assume the risk and consequences that follow its wrongful and unsuccessful procedure."

The Idaho Court seems to think there is something illegal and wrongful in the action of a party seeking to remove a cause to the Federal Court, notwithstanding his good faith in believing he has a right to such removal, and under the rule in the Pechner case, it had an opportunity to penalize bona fide attempts by non-residents to remove.

In this connection, the observations of the Supreme Court of the United States in the case of Harrison v. St. Louis, etc., Ry. Co., 232 U. S. 318, 334; 58 L. ed. 621, at page 625, in holding an Oklahoma statute

directed against removal proceedings by foreign corporations unconstitutional, are very pertinent. That Court said:

> "With this general principle in hand, let us come to fix one or more of the essentials of the right to remove as a prelude to testing the assailed statute and the action taken under it. In the first place, the right, unrestrained and unpenalized by State action, on compliance with the forms required by the law of the United States, to ask the removal of a cause pending in a State to a United States Court, is obviously of the very essence of the right to remove conferred by the law of the United States. In the second place, as the right given to remove by the United States law is paramount, it results that it is also of the essence of the right to remove, that when an issue of whether a prayer for removal was rightfully asked, arises, a Federal question results which is determinable by the Courts of the United States free from limitation or interference arising from an exertion of State power. In the third place, as the right freely exists to seek removal unchecked or unburdened by State authority, and the duty to determine the adequacy of a prayed removal is a Federal and not a State question, it follows that the States are, in the nature of things, without authority to penalize or punish one who has sought to avail himself of the Federal right of removal on the ground that the removal asked was unauthorized or illegal."

It seems perfectly apparent, when these two quotations are considered together, that the Idaho Courts have assumed to do exactly what the United States Supreme Court says cannot be done, for they have penalized an attempted removal of a case which the removing party was certainly justified in considering removable, on the theory that such removal was unauthorized and illegal and an act which in some unexplained way savored of unfair and unconscionable dealing. We do not think that such a position could or should be sustained.

The rule we have been discussing was the rule of construction under the removal statutes prior to the Judicial Code, and the question naturally arises whether such construction is to be applied to that Code, notwithstanding the radical changes made by Sec. 29. These changes are shown by the italicized portions of the section which we have quoted above and are, briefly, the requirement of a *verified* petition, the limitation of the time within which to file a certified copy of the record in the Federal Court to *thirty days* from filing petition for removal, the provision that the removing party must *plead, answer or demur* in the Federal Court within *thirty days* after the record is filed there, and the requirement that *written notice* of the petition and bond for removal must be given to the adverse party before they are filed. The first three of these requirements seem clearly to be for the purpose of procuring a speedy and expeditious joinder of issue on the right to remove the cause as well as on the merits of the case,

and to the prevention of sham and fictitious removals, or removals merely for the purpose of delay. It also seems clear that the provision as to pleading in the Federal Court must do away with any necessity for pleading in the State Court prior to removal, and it has been argued, though, so far as we have found, not sustained, that this last provision makes any pleading in the State Court a waiver of the right to remove.

But what is the purpose of requiring notice to be given to the adverse party before the petition and bond are filed? It has been suggested in Cropsey v. Sun Publishing Assn., 215 Fed. 132, that the purpose is merely to advise plaintiff of defendant's intention to remove, but this seems a somewhat insufficient explanation. The Courts have held that the requirement of notice is mandatory and a matter of substance. See:

United States v. Sessions, 123 C. C. A. 570, 205 Fed. 502.

Loland v. N. W. Co., 209 Fed. 626.

Warner v. Bissinger, 210 Fed. 96.

Goins v. Southern Pac. Ry. Co., 198 Fed. 432.

If the purpose of notice is merely to advise plaintiff of defendant's intention and it has no binding effect, the requirement of notice serves no useful purpose, and there is no reason for holding it mandatory.

On the other hand, it is equally clear that the requirement of notice is not for the purpose of having

a determination on the question of removal in the State Court.

United States v. Sessions, *supra.*
Cropsey v. Sun Pub. Co., *supra.*
Goins v. So. Pac. Ry. Co., *supra.*
Harrison v. St. Louis, etc., Ry. Co., 232 U. S. 318, 58 L. ed. 621.

It would seem a more reasonable explanation of the requirement of notice that such notice is in the nature of process, and when it has been served and filed and a petition and bond for removal in proper form have been filed, that the notice amounts to an appearance by the party seeking removal, and is a notice both to the adverse party and to the Court that all further proceedings in that Court are terminated and that the adverse party has the right from such date to insist upon a strict compliance with the requirements of Sec. 29, or the attempted removal will fail. When thus explained, the purpose of the statute becomes entirely clear and the requirement is brought in line with the other changes in the section, because this provision tends to secure a speedy determination of the right to remove and an orderly procedure for securing such determination.

Clearly, where the Federal Court, which alone can pass upon the question, holds that the case is not removable and remands it, the jurisdiction of the State Court is restored, and probably the same would be held where the party failed to file a certified copy of the record in the Federal Court within the thirty days.

There is no longer any reason for applying the rule adopted by the Supreme Court in Insurance Co. v. Pechner, because then the requirement of a verified petition and notice and the strict limitations of time within which an issue of law may be framed do away at once with delay and with sham attempts at removal. The condition of the bond is for payment of all costs and damages if the suit is wrongfully or improperly removed, and Sec. 37 provides for a remand in case of such improper removal, and these two provisions clearly contemplate that in some instances it may develop that the Federal Court has acquired jurisdiction which it cannot retain. In such cases, it is the purest fiction of law to hold that the State Court never lost jurisdiction, and the logical conclusion would be that by a compliance with the forms prescribed by the statute, it did lose jurisdiction, but this jurisdiction was later restored.

In United States v. Sessions, 123 C. C. A. 570, 205 Fed. 502, the notice was served after the petition had been filed, and the Federal Court refused to remand for this reason. The case was before the Circuit Court of Appeals on application for mandamus which was denied. The Court said:

> "The language in form is imperative. Why should not such prior notice be regarded as an essential step in the process of removal? The rule is that, since the right to remove is statutory, in order 'to effect a transfer of jurisdiction all the requirements of the statute must be followed.' (Babbitt v. Clark, 103 U. S. 606, 610; 26 L. ed.

507.) The provision is either mandatory or inoperative. There is no middle course. The mandate must be carried into effect, or be practically destroyed. However, we cannot at this stage definitely pass upon the question, for after all the present record presents only a question of jurisdiction. The power in a District Court to determine such a question *applies as well to a case without as to a case within its jurisdiction.*" (The italics are ours.)

Perhaps the best discussion on the question of notice is that of Judge Van Fleet in Goins v. So. Pac. Ry. Co., 198 Fed. 434, pp. 432 and 435, where it is said:

"The right of removal is justly regarded as one of great moment to the suitor, and its exercise not infrequently involves important changes in the aspects, if not the results of the controversy; and the history of many cases involving the right tends to disclose the great desirability, if not the necessity, in order to fully protect the rights of the adverse party, by avoiding expensive and unseemly delays and other inconveniences of a more or less serious nature that some notice of the proceeding be had. Appreciating this, Courts in some instances have undertaken to supply the omission by a rule requiring notice (Chiatovich v. Hanchett, (C. C.) 78 Fed. 193; Creagh v. Equitable, etc., Co., Soc. (C. C.) 83 Fed. 849); and while they have eventually been compelled to hold that, no notice being required by the statute,

none could be insisted upon as essential to the exercise of the right, no Court has undertaken to belittle the value of such a provision in the law. The matter of surprise is, therefore, in view of the importance of the right, not that Congress should now have seen fit to make the requirement, but that it should not have earlier perceived the propriety of so doing. Without the effect of materially changing the method of procedure, it will tend to protect the parties and the Courts as well, not alone against mistakes and delays in proceedings genuinely instituted, but against unwarranted and frivolous attempts to exercise the privilege in instances where no real right exists. And, speaking in a general way, I entertain little doubt that it was for reasons such as indicated in the class of cases referred to that the requirement of notice has been prescribed."

In Buxton v. Pennsylvania L. Co., 221 Fed. 718, 725, the Court says:

"If, as contended, after the provisions of the Judiciary Act have been complied with, the State Court may nevertheless retain jurisdiction of a removable cause until it is taken away by the Supreme Court, of what avail are the provisions of the removal statute? Why should the Circuit Court be clothed with power to command the State Court to make return of the record? Why, notwithstanding such refusal, is the party desiring removal permitted to enter the record in the Federal Court, and thus impose on that Court the

duty to proceed in the same manner as if the cause had been originally commenced in that forum? And why is it made a criminal offense in the Clerk of the State Court to refuse a copy of such record when his legal fees are tendered by the party desiring removal?

"It is unthinkable that Congress would provide such an elaborate procedure if it could be of no avail without the consent of the State Court, or until the Supreme Court of the United States had so directed. The right of removal is one conferred by the Federal statute. It is therefore a Federal question. An order of removal by the State Court is unnecessary. My attention has been called to no authority which holds the contrary. The right of removal is in no wise dependent on the judgment of the State Court. * * * * "

It thus appears that there has been some doubt as to just what effect should be given to the changes made in Sec. 29, and, under these circumstances, the query naturally arises: What was the intention of Congress when it made these radical changes in the statute? It is a matter of legal history that the question of revising the Federal Judiciary procedure was before Congress in one form or another for nearly twenty years before the enactment of the Judicial Code. Finally, in 1910, a joint committee of both houses, which had been working on the matter for some time, prepared a bill, and this bill was introduced in the Senate as Senate Bill 7031 in the Sixty-

first Congress and in the House as H. R. 23377. Sec. 29 in each bill was identical with Sec. 3 of the Act of 1875 down to the provision relating to actions quieting title to land, which was in another section. The bill passed the Senate in this form (Cong. Rec., vol. 46, p. 2140) without discussion.

The House of Representatives reached Sec. 29 of H. R. 23377 on December 14, 1910 (Cong. Rec., vol. 46, p. 319). The section was read in its original form, and then, upon motion of Mr. Moon, chairman of the special committee on Revision of the Judicial Code, the section was amended to correspond to the provisions of H. R. 23002, which had passed the House in April, 1910, but which never passed the Senate. As amended, Sec. 29 provided for a duly verified petition requiring "due notice" of petition and bond for removal, required the party removing to file a certified copy of the record within *twenty* days from filing his petition and to plead to the complaint within *twenty* days from filing the record in the Federal Court.

Then, after such amendment, Mr. Stanley of Kentucky moved to amend the section by striking out all of said section after the word "therein" in line 10 on page 24 of the bill as presented. This amendment would have stricken from the section the provision that it should be the duty of the State Court to accept the petition and bond and proceed no further in the suit, and the provisions for notice of filing petition and for pleading in the Federal Court within thirty days from filing the record, or practically all

the changes in the section, except the requirement for a verified petition and for filing record within twenty days.

The purpose of the amendment offered by Mr. Stanley and the intention of Congress in passing the section without amendment are shown clearly by the following debate (Cong. Rec., vol. 46, p. 320):

> "MR. STANLEY: 'Mr. Speaker, in every case brought before a State Court, where the question of Federal jurisdiction is raised, that question can be settled in the State Court as well as in the Federal Court, as to whether or not the defendant has a right to removal. If the complainant and defendant are bona fide citizens of different States, or if for any other reason the defendant is entitled to a removal, that question can be adjudicated in the State Courts. If the State Court is guilty of any error, that question can be reviewed in the Supreme Court of the State. If there is an error there, an appeal lies from the finding of the Supreme Court of that State to the Supreme Court of the United States. The effect of this provision of the law is to allow the defendant to make any sort of an excuse he pleases, any kind of an objection to the jurisdiction of the State Court. He may make the flimsiest allegation in the world that there is a question of diverse citizenship, and then, *ipso facto*, he can take that case from the jurisdiction of the State Court to the jurisdiction of the Federal Court.

" 'He can bring the complainant and his witnesses hundreds of miles into a Federal Court to adjudicate that question, and if the complainant has not the means to stand the heavy expenses incident to litigation in a Federal Court, this very petition for a removal is a practical denial of justice. This question, whether or not diverse citizenship is involved, is a question that could and should be decided by the State Court, and if the party aggrieved is wronged by the decision, he has an abundant opportunity for appeal. I can not express too strongly my objection to the means here provided for delays of justice to complainants by bogus and fictitious transfers to Federal Courts.'

"MR. MOON of Pennsylvania: 'Mr. Speaker, just a word. The adoption of an amendment of that kind would simply allow the defendant to file his petition in the District Court for the removal from the State Court, and thereby give the District Court jurisdiction and then permit the State Court to go on and try the case. It would be utterly absurd to permit both Courts to have jurisdiction. I hope the amendment will be voted down.'

"The question was taken; and on a division (demanded by Mr. Stanley) there were—ayes 21, noes 50.

"MR. STANLEY: 'Mr. Speaker, I ask for the yeas and nays.'

"The yeas and nays were refused, 17 members, not a sufficient number, supporting the demand therefor.

"MR. STANLEY: 'Mr. Speaker, I move to strike out the whole section.' The Clerk read as follows:

"Amend by striking out Section 29.

"MR. STANLEY: 'Mr. Speaker, the objection raised by the gentleman from Pennsylvania (Mr. Moon) is not, in my opinion, well founded. It is true that on first blush it appears that there is a serious delay in justice by allowing two Courts to proceed at the same time with the same case. But there is practically no denial of justice in this thing, and the way to remedy it is to have the appellant who wishes to go into the Federal Court wait for a decision of this question in the State Court, and not have the petitioner who brings the suit in the State Court taken arbitrarily into the Federal Court whether there is any Federal question involved in the case or not.

" 'In the practical operation of the law it works no detriment, because if the State Court takes jurisdiction and renders its judgment, the defendant can still proceed in the Federal Court; he can take his petition in there and he can have his question adjudicated; and if there is any error in the State Court, that question will always be remedied on appeal.'

"MR. MOON of Pennsylvania: 'The gentleman will observe that he is not accomplishing the

object which he seeks to accomplish by striking out this section. This is only the method of procedure. Section 28 gives the power of the removal, and we have passed that section and have reached Section 29.'

"MR. STANLEY: 'I am aware of that, and I am moving to strike out Section 29.'

"MR. MOON of Pennsylvania: 'That only provides the method of procedure in taking the removal. Section 28 gives the right of transfer.'

"MR. STANLEY: 'I do not care to deprive them of the transfer if there is a question of diverse citizenship.'

"MR. MOON of Pennsylvania: 'It is only the method of transfer from one Court to the other. If you strike out this section, it leaves the right with no method of putting it into operation.'

"MR. STANLEY: 'Exactly, and I would rather have no method of transfer than to have a wrong. It is better to have no transfer at all made than to have transfers made that are absolutely bogus or fraudulent on their fact and made simply for the purpose of delay.'

"MR. MOON of Pennsylvania: 'Mr. Speaker, I want to say just one word, and that is that to strike out Section 29 would be—I want to characerize it mildly—absurd. The right and power is granted by the Constitution for Courts to exercise this jurisdiction. This law is passed only to carry out the constitutional right. Section 28 af-

firms the cases under the Constitution which may be transferred, and that section we have passed. Section 29 has reference only to the method of transfer. If you strike out Section 29, you leave the right to make the transfer, but no means of putting that transfer into execution. It would therefore be ridiculous, and I ask that the amendment be voted down.'

"The SPEAKER: 'The question is on the amendment offered by the gentleman from Kentucky.'

"The question was taken, and the amendment was lost."

It thus appears that Mr. Stanley wanted Sec. 29, as presented to the House, changed so that the State Court could retain jurisdiction of causes which were not removable and was objecting to the section as it stood, because it allowed defendants to deprive the State Court of jurisdiction even in cases that were not removable. It appears further that he wished to do this by striking out the provisions as to notice, as to pleading in the Federal Court, and the limitation of the old statute that the State Court should proceed no further. Both sides conceded that, under the section as it was then before the House, the State Court could not retain jurisdiction even where the case was *not* removable, and the whole controversy was whether this provision should be still further changed so that both Courts could have jurisdiction at the same time, or whether jurisdiction after notice

had been served and petition and bond had been filed should be in the Federal Court exclusively. The House, by a positive vote, rejected both amendments offered by Mr. Stanley, and thus put itself on record for the proposition that after the service of notice and of filing of petition and bond for removal, the jurisdiction of the State Court should cease.

The further history of this action in Congress is brief. When Senate Bill 7031 reached the House, the House bill was substituted for it and passed. A conference committee was then appointed and the reports of the conferees were made to both houses on March 2, 1911, and adopted. This conference report changed Section 29 to its present form by substituting written notice for due notice and allowing thirty days instead of twenty days for filing copy of the record and for pleading. There was no further debate as to Sec. 29, the statement made by the House conferees merely referring to the change made by the committee in the bill as it passed the House.

From this review of the decisions relating to the relative jurisdiction of the State and Federal Courts in cases in which removal was sought and of the legislative history of Sec. 29 of the Judicial Code, it appears that the rule announced in Insurance Company v. Pechner, *supra*, in 1877, to the effect that State Courts did not lose jurisdiction in cases which were ultimately held not to be removable, upon the filing of a petition and bond, has been changed by Sec. 29 of the Judicial Code, and that under the present statute, after the serving of written notice of peti-

tion and bond for removal and the filing of such petition and bond, the jurisdiction of the State Court absolutely ceases, although this jurisdiction may be restored subsequently by a remand from the Federal Court, or possibly without such remand, by the failure of the removing party to file his record within the thirty days limited by the statute.

It follows from the above discussion as to the effect of Sec. 29 of the Judicial Code, that the default entered by the Clerk of the District Court of Blaine County on Oct. 16, 1912 (Tr. p. 15), and the judgment entered thereon, were void, and the enforcement of such judgment in its entirety should be restrained as prayed for by appellant in its Bill. The Bill of Complaint in the present case shows that on the 7th of October, 1912, and before the time in which complainant was required to answer or plead to plaintiff's Complaint, a written notice was served upon their attorneys of record in said action and on October 8, 1912, and also within such time, the petition for removal, bond on removal and such written notice were filed with the Clerk of Blaine County; and on the 28th of October, 1912, a certified copy of the record was filed with the Clerk of the United States District Court for the proper district (Tr. pp. 14 and 15). It further appears that the amount claimed by these parties was far in excess of the jurisdictional amount for the Federal Court, and that complainant sought the removal of said cause in good faith. (Tr. p. 23.)

Under these circumstances, the judgment obtained was void, and while the Federal Court might not

have jurisdiction to set it aside, nevertheless as appellees, Clara Mills and others, are seeking to put such judgment to an unconscionable use and to enforce a collection upon it of the full amount of their claims, its enforcement should be restrained in this action where all parties are before the Court and all the rights in the bond given by appellant as surety for the Bank Commissioner of the State of Idaho can be adjudicated.

It appears from the record that since appellees obtained their judgment in the State Court, a number of other claimants have made claims against the surety for more than the full amount of the penalty of the bond, and that such claimants were not parties to the suit brought by appellees, although they should have been parties thereto, for under the authorities hereinbefore cited appellees should have brought a suit in equity in behalf of themselves and all other depositors so that all claims against the surety could have been adjudicated and determined in one suit, not only as against the surety but as between the claimants themselves. Appellees having failed to bring such action and having, without notice to appellant or the knowledge of the Court, taken appellant's default while removal proceedings were pending, contrary to the provisions of Sec. 29 of The Judicial Code, and having declined to permit the vacation of such default upon any terms, and having collected dividends of which there has been no adjudication, credit or allowance by the Court, and it appearing that the enforcement of the judgment so obtained

must result in irreparable injury to appellant in compelling it to pay an amount largely in excess of the penalty of its bond or else result in an injury to a large number of other claimants who must be content with less than their pro rata part of the penalty of such bond, we respectfully submit that a preliminary injunction should have been granted as prayed for.

Respectfully submitted,

RICHARDS & HAGA and
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